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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
GTE Telephone Operating Companies) CC Docket No. 98-79
GTOC Tariff No. 1)
GTOC Transmittal No. 1148)

**PACIFIC BELL OPPOSITION TO MCI WORLDCOM AND NARUC
PETITIONS FOR RECONSIDERATION**

I. INTRODUCTION

MCI Worldcom's petition to have the Commission reconsider the ADSL TARIFF ORDER argues issues previously argued and decided in this Docket. It offers no new proof or substance, and it misstates and/or mischaracterizes both the facts, the law, and Commission precedent. Therefore, MCI Worldcom's petition should be denied.

The National Association of Regulatory Utility Commissioners' (NARUC) requests for clarification and/or reconsideration of the ADSL TARIFF ORDER also urge jurisdictional arguments previously rejected and in essence seek to narrow the scope of the ADSL TARIFF ORDER in ways that are unnecessary and improper given the basis and nature of the Commission's jurisdiction over the ADSL Tariff. In addition, NARUC's separations issues are unrelated to this tariff filing. They are not before the Separations Joint Board, and they are contrary to *Smith v. Illinois Bell*, 282 U.S. 133 (1930) and the resulting Part 36 Separations procedures which call for an allocation of costs among the interstate and intrastate jurisdictions based on usage. Therefore, NARUC's requests should be rejected as well.

Pacific Bell Opposition to
Petitions for Reconsideration

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CC Docket No. 98-79
January 5, 1999

II. THE COMMISSION WAS CORRECT IN DETERMINING THAT INTERNET CALLS ARE ONE CALL END-TO-END

MCI Worldcom basically argues that the Commission should treat calls to the Information Service Provider (ISP) as one communication and the information service component as another. MCI claims that this would be consistent with the statutory definition of "information service" and "telecommunications" as the Commission has interpreted those terms in the Universal Service Report to Congress and in orders adopted since the passage of the 1996 Act. MCI, pp. 2-3.

The Commission has properly and consistently rejected that argument. In a recent Order, the Commission found:

"...the Commission traditionally has determined the jurisdictional nature of communications by the end points of the communication and consistently has rejected attempts to divide communications at any intermediate points of switching or exchanges between carriers ...Although the Commission concluded that ISPs do not appear to offer 'telecommunications service', and thus are not 'telecommunications' carriers that must contribute to the Universal Service Fund it has never found that 'telecommunications' ends where 'enhanced' information service begins...[A]n otherwise interstate basic service...does not lose its character as such simply because it is being used as a component in the provision of a[n enhanced] service that is not subject to Title II. Under the definition of information service added by the 1996 Act, an information service, while not a telecommunications service itself, is provided via telecommunications. As explained in the *Universal Service Report to Congress*, because Information services are offered via telecommunications, they necessarily require a transmission component in order for users to access information. We, therefore, analyze ISP traffic as a continuous transmission from the end user to a distant Internet site."¹

¹ FCC Memorandum Opinion and Order, CC Docket No. 98-79, Released October 30, 1998 ¶17 (footnotes deleted); ¶20 (emphasis added, footnotes deleted). See also *Southwestern Bell Tel. Co. Transmittal Nos. 1537 & 1560 Revisions to Tariff F.C.C. No. 68*, 3 FCC Rcd 2339 (released April 22, 1988) [Switching at the credit card switch is an intermediate step in a single end-to-end communication. The jurisdictional nature of a call is determined by its ultimate origination and termination, and not...its intermediate routing.].

III. ADSL SERVICE ACCESS TO THE INTERNET IS JURISDICTIONALLY INTERSTATE

The Internet is part of the World Wide Web. High speed access to the Internet allows the end user to establish communications and communicate not only within the State, but around the country and, indeed, around the world. No one who has ever accessed the Internet would reasonably contend it is purely an intrastate or local service in terms of the communications it permits, nor would any reasonable Internet access customer want his or her high-speed access to be so jurisdictionally limited. MCI Worldcom itself concedes the point by stating that "ADSL, like any other transmission technology, clearly has both interstate and intrastate uses, and is thus properly tariffed at ... the federal ... level". MCI, p. 1. MCI also believes it is properly tariffed at the State level. *Id.*

Dating back to 1983 in Docket 78-72, the Commission has recognized the interstate nature of this traffic.² In fact, it was on that basis that the Commission determined it could adopt an access charge exemption for enhanced service providers as a transitional mechanism to avoid rate shock and disruption of service to their customers.³ More recently, the Commission recognized the nature of the Internet as an "interconnected global network of thousands of interoperable packet-switched networks" by which the Information Service Provider "connects the end-user to an Internet backbone provider that carries traffic to and from other Internet host sites ..." and can be

² *MTS and WATS Market Structure, Memorandum Opinion and Order*, 97 FCC 2d 682, ¶¶78, 83 & n. 58.

³ If the traffic were purely local or jurisdictionally intrastate, the Commission would have had no jurisdiction to adopt the access charge exemption because jurisdiction over such traffic is reserved to the States. 47 U.S.C. 152(b).

utilized by "a computer user during a single session interact[ing] sequentially with a number of data bases in different states"⁴ Also, the predominantly interstate use of access to the Internet was recently confirmed by Park Region Telephone Company which provided evidence that "less than two percent of the inquiries to our Minnesota Web site originate in Minnesota,"⁵ and by SBC's analysis which indicates that 92% to 99% of the Internet usage it carries is interstate depending on the State.⁶

It would be uneconomical to maintain duplicate databases in every State, and interstate access to multiple databases and information on the broad-based Internet is quite commonplace. As an Internet access service provider, MCI Worldcom certainly knows this to be true, and it has offered absolutely no proof that ADSL access to the Internet is purely or predominantly intrastate. At best, such access is jurisdictionally and inseverably mixed; with the majority of such traffic being interstate as is most long distance, 800 service, private line service, and access service usage.⁷ Since communications occur on the Internet simultaneously and sequentially in several states

⁴ *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, as amended*, 11 FCC Rcd. 21905, n. 291 (1996); *Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture, Notice of Proposed Rule Making*, 4 FCC Rcd. 3983, n. 67.

⁵ *See Comments of Park Region Telephone Company*, p. 1 in CC Docket No. 80-286 [NECA Petition for Waiver of Section 36.2(a)(3)].

⁶ MCI Worldcom further claims the Commission should clarify that xDSL Services are not inherently interstate services and are not inherently access services, ostensibly on the basis that they can be used with non-Internet services. MCI, pp. 8-10. This is contrary to the view of the Retail Internet Service Providers in CC Docket No. 98-146 which stated: "There is a simple reason that xDSL deployment is so intimately linked to competition in the market for retail Internet access. Simply put, today essentially the only reason a consumer or small business would order xDSL is to obtain high speed access to the Internet."

⁷ In fact, interstate and international use of Internet access can be expected to grow as more and more end-users begin to use it as an alternative to message rated voice grade long distance service. *See USA TODAY*, Tuesday February 10, 1998, Section: Money, Page 1B, "Cheap calls via the Net Internet could revolutionize phone service." The reason is simple: Such calls could be viewed as less costly or as free (after paying the Information Service Provider's flat rate) when compared to traditional interstate and international or other services in which a fee per minute for the service is charged.

over chat lines and the like, the only way to prove otherwise would be to show that the particular Internet server can only be used or accessed on an intrastate basis. Here, there has been no such showing.

IV. THE INFORMATION SERVICE PROVIDER POINT OF PRESENCE IS NOT THE RELEVANT END POINT FOR JURISDICTIONAL ANALYSIS

The Commission has never considered a Point of Presence end point – the point where end user calls are delivered by the local exchange carrier for transmission elsewhere – to be the jurisdictional determinant of the nature of the communication or call,⁸ nor have the Courts.⁹ Were that the case, the Commission would have little, if any, jurisdiction over communications because there is a strong incentive for connecting carriers to locate their Points of Presence (POPs) in close proximity to or within the serving local exchange carrier's Central Office to avoid interoffice transport and transmission charges, to reduce their cabling costs, or for technology reasons (*i.e.*, distance-related equipment limitations). For example, long distance carriers typically locate their Points of Presence in this manner and no one has suggested that, as a consequence, their out of state traffic should be treated as intrastate, rather than interstate, and it is not uncommon for incumbent Local Exchange Carriers to locate the facilities they use to provide interstate toll access solely within one State.¹⁰

⁸ *Southern Pacific Communications Company Tariff* FCC No. 4, *Memorandum Opinion and Order*, 61 FCC 2d 144, ¶6 (1976); *Petition for Emergency Relief and Declaratory Ruling filed by the BellSouth Corp.*, *Memorandum Opinion and Order*, 7 FCC Rcd 1619, ¶12 (1992); *MTS and WATS Market Structure*, *Memorandum Opinion and Order*, 97 FCC 2d 682, n. 58 (1983).

⁹ See *New York Telephone v. FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980); *United States v. AT&T*, 57 F. Supp. 451, 454 (S.D.N.Y. 1944), *aff'd sub nom. Hotel Assoc. v. United States*, 325 U.S. 837 (1945); *Puerto Rico Tel. Co. v. FCC*, 553 F.2d 696, 699 (1st Cir. 1977); *MCI Communications Corp. v. AT&T*, 369 F.Supp. 1004, 1029 (E.D. Pa. 1973).

¹⁰ FCC Memorandum Opinion and Order, CC Docket No. 98-79, Released October 30, 1998, ¶17 [Indeed, in the vast majority of cases, the facilities that incumbent LECs use to provide interstate access are located entirely within one state].

In fact, although MCI Worldcom represents that the Commission's BellSouth Memory Call decision supports its analysis regarding the location of "facilities and apparatus," the decision could not be clearer and does not support MCI Worldcom on this point. In BellSouth Memory Call, the Commission stated:

"Our jurisdiction does not end at the local switch but continues to the ultimate termination of the call. 'The key to jurisdiction is the nature of the communication itself rather than the physical location of the technology... The fact that the facilities and apparatus used to provide BellSouth's voice mail service may be located within a single state, this [sic] does not affect our jurisdiction or expand the Georgia PSC's jurisdiction. This Commission has jurisdiction over, and regulates charges for, the local network when it is used in connection with origination and termination of interstate calls. The Commission also has made it clear that it has not ceded jurisdiction over call forwarding when used in interstate communications even if that service is locally tariffed.'" 7 FCC Rcd at 1621.

Obviously then, it is the nature of the total telecommunication which counts and not who or what facilities and apparatus are deployed to deliver it. Moreover, it is completely disingenuous for MCI Worldcom to suggest that it is the location of facilities and apparatus which determines the jurisdictional nature of the traffic when MCI has had POPs located in the same exchanges and paid predominantly interstate access charges on the long distance traffic transmitted from them for many years. Finally, MCI Worldcom's argument ignores that, if there were no interstate traffic originated or terminated over the Internet, a federal access charge exemption would not have been needed for such traffic.

V. MCI WORLDCOM HAS NOT SHOWN OR PROVIDED ANY PROOF THAT ADSL ACCESS TO THE INTERNET IS JURISDICTIONALLY INTRASTATE

Despite its experience as a domestic and global provider of Internet service and Internet access services (through its acquisition of UUNet, Brooks, and MFS), MCI Worldcom has not offered a scintilla of evidence that ADSL access to the Internet is

purely or predominantly intrastate in nature.¹¹ In fact, MCI Worldcom can make no such showing because the jurisdictional nature of the communication will generally vary by the call and by the databases to which access is or may be sought during the call. As noted earlier, several different databases in several different States or countries can be accessed sequentially and simultaneously during the course of one call, making it all but impossible to know ahead of time what databases will be accessed in terms of their specific locations, or whether they are intrastate, interstate, or international. And the Internet user largely does not care where such databases may be located.

It is known, however, that based on the economics, structure, and use of the Internet that purely intrastate or predominantly intrastate uses will be rare and highly unlikely to divest this Commission of its primary jurisdiction in the area. If MCI Worldcom can show which calls or databases are purely or predominantly intrastate or a service that is so limited, then it might make a case for intrastate tariffing. But, as yet, it has not done so.

VI. NARUC's REQUEST FOR CLARIFICATION ON INTRASTATE TARIFFING IS UNNECESSARY AND UNFOUNDED

NARUC requests the Commission to clarify that its Order does not preclude States from requiring intrastate tariffs of xDSL services designed to connect end-users to Internet Service Providers. NARUC, p. 1. Unless it can be shown that such services will be exclusively intrastate or that their interstate use is less than 10%, then there is no basis for intrastate tariffing, and no basis for the Commission to clarify its ruling. Like MCI Worldcom, NARUC has made no such showing.

¹¹ If the interstate traffic on the line constitutes more than ten percent of the total traffic on the line, it is treated as interstate rather than intrastate. 47 C.F.R. 36.154(a). Thus, it is hard to imagine Internet access failing to meet the minimum threshold for it being treated as an interstate line.

VII. NARUC's REQUEST FOR CLARIFICATION ON COST ALLOCATION PROCEDURES IS CONFUSING AND UNNECESSARY TO THE COMMISSION'S REVIEW OF THIS TARIFF FILING

NARUC appears to request that the Commission speak to the possibility of certain separations changes. If what NARUC wants is to change Part 36, it ignores that the Part 36 allocation of costs is consistent with the Supreme Court's ruling in *Smith v. Illinois Bell* which requires that such costs be allocated between the interstate and intrastate jurisdictions based on usage.

NARUC is wrong in suggesting that the Joint Board might change the 10% rule. That issue is not before the Joint Board. What is before the Joint Board is the question of whether or not new technologies increase the likelihood there will be more services (like Internet) that are jurisdictionally inseverable and if Part 36 should distinguish between jurisdictionally pure (e.g., interstate interexchange services) and jurisdictionally inseverable (e.g., Internet) services.

In any event, it is unnecessary and premature to address these separations issues in the context of this tariff filing, and they are beyond the scope of the designated issues for this tariff proceeding.

VIII. NARUC's REQUEST THAT THE COMMISSION DISCLAIM ITS RATIONALE OR MAKE IT TENTATIVE SHOULD BE REJECTED

NARUC requests the Commission to disclaim or make tentative its rationale for treating ADSL access to the Internet as jurisdictionally interstate. NARUC, p. 1. In effect, NARUC is requesting the Commission to disclaim or make tentative the very basis for its jurisdiction over the ADSL tariff at issue. While the Commission can always revisit its decision at a later date, it must have a basis for asserting jurisdiction over the tariff and allowing it to go into effect. What NARUC suggests would undermine that

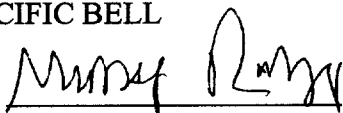
basis, create legal challenges, and ignore the fact that access to the global Internet is irrefutably primarily interstate. NARUC is also requesting the Commission to disaffirm a rationale that can hardly be deemed tentative. In fact, as noted earlier, the rationale is based upon years of legal precedent and prior Commission rulings.

IX. CONCLUSION

MCI Worldcom's position is unreasonable, unsupported, and should be rejected outright. Its petition for reconsideration should be denied. NARUC's requests for clarification and/or reconsideration are unnecessary, unwarranted or unfounded. Its requests should also be denied.

Respectfully submitted,

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By: 

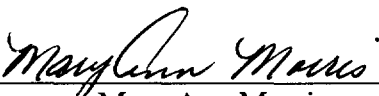
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Certificate of Service

I, Mary Ann Morris, hereby certify that the foregoing "Pacific Bell Opposition to MCI WorldCom and NARUC Petitions for Reconsideration," has been served on January 5, 1999 to the Parties of Record.



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